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**IN THE
COURT OF APPEALS OF INDIANA**

MAX R. MOLLETTE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 63A01-0611-CR-524
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffery L. Biesterveld, Judge
Cause No. 63C01-0303-FA-109

March 20, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Max R. Mollette (Mollette), appeals the trial court's denial of his Motion for Discharge pursuant to Indiana Criminal Rule 4(C).

We affirm.

ISSUE

Mollette raises one issue on appeal, which we restate as follows: Whether the trial court erroneously denied his Motion for Discharge.

FACTS AND PROCEDURAL HISTORY

On March 3, 2003, the State filed an Information, charging Mollette with Count I, possession of methamphetamine over 3 grams with intent to deliver, a Class A felony, I.C. § 35-48-4-1(a)(D)(b)(1); Count II, possession of methamphetamine over 3 grams, a Class C felony, I.C. § 35-48-4-6(a)(b)(1)(A); Count III, maintaining a common nuisance, a Class D felony, I.C. § 35-48-4-13(b)(2)(b). That same day, attorney Fleig entered his appearance and the matter was set for trial by jury on December 18, 2003. On November 7, 2003, attorney Miller also entered his appearance for Mollette. On December 8, 2003, ten days before the scheduled jury trial, the parties agreed to vacate the trial date and reset the trial for March 25, 2004. The trial court charged Mollette with the time pursuant to Ind. Crim Rule 4(C).

On March 15, 2004, attorney Fleig filed his Motion to Continue or in the Alternative Motion for Leave for Withdrawal. In his motion, defense counsel asserted that his client failed to pay him and required additional time to arrange for the necessary funds. The motion stated, in pertinent part, that:

9. Pursuant to RPC 1.16(b)(4) grounds exist for the withdrawal of [Fleig] as [Mollette's] attorney herein.

10. But in the alternative the undersigned [Fleig] is prepared to remain as attorney for [Mollette] provided that the [t]rial date of March 25, 2004 is continued in order to give [Mollette] the opportunity to make reasonable arrangements for payment of fees herein and decide whether or not [Fleig] or [Miller] will be representing him.

WHEREFORE, [Fleig] respectfully requests the [c]ourt to continue the [t]rial date herein and grant [Mollette] until April 10, 2004 within which to make arrangements for payment of fees and to decide whether or not [Fleig] and/or [Miller] are to continue representing [Mollette] or in the alternative grant [Fleig] leave to withdraw as [Mollette's] attorney.

(Appellant's App. p. 21). On March 16, 2004, the trial court granted attorney Fleig's motion, vacated the March 25, 2004 trial date, and set the matter for pretrial conference on April 23, 2004. At this pretrial conference, the State offered Mollette a plea agreement which he rejected. Even though attorney Miller's affidavit establishes that Mollette indicated he wanted to exercise his right to be tried by jury at this pretrial conference, the Chronological Case Summary (CCS) is silent about this request and merely schedules the next pretrial conference for June 7, 2004. Further pretrial conferences were held on July 9, 2004, August 13, 2004, and August 30, 2004. Mollette did not request a trial date during any of these pretrial conferences.

At the September 10, 2004, pretrial conference, the trial court set the trial date for January 27, 2005. However, Mollette objected to the trial date setting and subsequently filed his Motion to Discharge on September 22, 2004, alleging a violation of Crim.R. 4(C). The trial court denied Mollette's motion, finding that "every step had been taken to bring Mollette to trial in a timely fashion" and that the State did not bear any "fault for

the failure to do so.” (Appellant’s App. p. 44). On November 8, 2004, and January 13, 2005, respectively, Mollette filed motions with the trial court to reconsider the denial of his Motion to Discharge. After the trial court denied his motions, Mollette filed a Motion to Certify Order for Interlocutory Appeal. On October 7, 2005, after the trial court granted his motion, the court of appeals denied jurisdiction over Mollette’s interlocutory appeal.

On February 24, 2006, a final pretrial conference was scheduled. As both parties informed the court that they were ready to proceed to trial, a trial date of March 28, 2006 was set. Approximately ten days before the commencement of the scheduled trial by jury, the State filed a Supplemental Proof of Compliance with the Discovery Order. Filing an Objection to the State’s Supplemental Proof, Mollette moved to continue the trial without any trial delay attributed to him. The trial court granted Mollette’s continuance but refused to allocate the delay to the State. A new trial was set for August 29, 2006. Mollette objected to this setting.

On August 29 through August 31, 2006, a jury trial was held. At the close of the evidence, the jury returned a guilty verdict on Count II, possession of methamphetamine over 3 grams, a Class C felony, and Count III, maintaining a common nuisance, a Class D felony. On September 29, 2006, during a sentencing hearing, the trial court sentenced Mollette to an executed sentence of six years on Count II, with 2 years on work release and two years on Count III, to run concurrent to the sentence imposed in Count II.

Mollette now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Mollette contends that the trial court erroneously denied his Motion for Discharge pursuant to Indiana Criminal Rule 4(C). Specifically, Mollette asserts that attorney Fleig's Motion to Continue or in the Alternative Motion for Leave for Withdrawal, filed on March 15, 2003, did not constitute an indefinite continuance.

The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, § 12 of the Indiana Constitution. *State v. Powell*, 755 N.E.2d 222, 224 (Ind. Ct. App. 2001), *trans. denied*. The provisions of Indiana Criminal Rule 4 implement the defendant's speedy trial rights by expressly requiring that a defendant be discharged if not brought to trial within certain prescribed time limits. *Id.* Indiana Criminal Rule 4(C) requires as follows:

No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

A defendant is not required to take affirmative action to obtain a trial date within the period set by Crim. R. 4(C). Rather, the burden is on the State to provide a speedy trial. *See Rivers v. State*, 777 N.E.2d 51, 54 (Ind. Ct. App. 2002), *trans. denied*. However, if a defendant seeks or acquiesces in a delay that results in a later trial date, the

time limitations set by Crim. R. 4 (C) are extended by the length of such delays. *See Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind. 1999), *reh’g denied*. Moreover, when a defendant requests an indefinite continuance and later becomes dissatisfied that his trial has not been reset, he must take some affirmative action to notify the court that he now desires to go to trial to reinstate the running of the time period. *Wheeler v. State*, 662 N.E.2d 192, 194 (Ind. Ct. App. 1996). Absent such notification, the subsequent delay is attributable to the defendant. *Id.*

In the instant case, the record reflects that Mollette was charged on March 3, 2003. Crim. R. 4(C) therefore required that Mollette be brought to trial by March 3, 2004, unless the period was tolled by a delay chargeable to him. Here, we will not engage in counting the time chargeable to the State or that chargeable to Mollette because we hold that attorney Fleig’s March 15, 2003, motion for a continuance constituted a request for an indefinite continuance. In his motion, attorney Fleig asserted that his client had difficulty raising the necessary funds to pay him and requested additional time to arrange for the money. In particular, attorney Fleig asked the trial court “to continue the [t]rial date herein and grant [Mollette] until April 10, 2004 within which to make arrangements for payment of fees . . .” (Appellant’s App. p. 21). It is clear that attorney Fleig did not indicate a specific length of delay for the continuance, but merely represented that the funding issues might be resolved by April 10, 2004.

Thus, where an indefinite continuance is granted, “the defendant must take some affirmative action to notify the court that he [] desires to go to trial . . .” *Wheeler*, 662

N.E.2d at 194. In this regard, Mollette focuses our attention on attorney Miller's affidavit in which he states that during the pretrial conference of April 23, 2004, Mollette "rejected the [State's plea] offer and indicated that he wanted a jury trial." (Appellant's App. p. 25). However, our review of the record discloses that the CCS is silent about Mollette's wish for a jury trial. As we stated before, in order for the indefinite continuance to be lifted, the defendant must make an affirmative action to notify *the court . . .*" *See id.* (emphasis added). Mollette's conveyance to the State of his election to proceed to trial made in response to the State's offer of a plea is not sufficient to notify the trial court that he had changed his mind and now wished a trial by jury. As Mollette never acted affirmatively to notify the trial court of his dissatisfaction that no trial date was set, we find that the entire time period after Mollette's indefinite continuance request was a delay caused by him, and therefore, his Motion for Discharge was premature. Consequently, we decline Mollette's request to reverse the trial court.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly denied Mollette's Motion for Discharge pursuant to Crim. R. 4(C).

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.